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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

..... TERM, 1973

No. 73-45

THE WILSON BUILDING, *Petitioner*

v.

PETER J. BRENNAN,
Secretary of Labor, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 5TH CIRCUIT

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v.

PETER J. BRENNAN,
Secretary of Labor, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 5TH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the 5th Circuit, entered on the 27th day of April, 1973.

I.

Citation to Opinions Below

The opinion of the Court of Appeals is not yet reported, but a copy thereof is attached hereto as Part 1 of Appendix A. The opinion of the District Court is reported at 320 F.Supp. 664 (S.D.Tex. 1970) and a copy thereof, along with a copy of the District Court judgment, is attached hereto as Appendix B.

II.

Jurisdiction

The judgment of the Court of Appeals, printed in Appendix A hereto, was entered on April 27, 1973. The petition for rehearing was denied May 22, 1973 (Appendix A, Part 2) and the Court of Appeals has stayed its mandate through July 5, 1973.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

III.

The Question Presented

Is the business of operating adjoining office buildings having a miscellany of tenants, none of whom are engaged in the production of goods for commerce, an enterprise engaged in commerce within the meaning of the Fair Labor Standards Act of 1938, as amended, (29 USCA 201, et seq.) by virtue of the fact that the elevator operators have had among their ordinary passengers mailmen and expressmen with out of state letters and parcels?

IV.

Statute Involved

The statute controlling the issue is the Fair Labor Standards Act, 29 USCA 201, et seq. The relevant provisions thereof are set forth below.

29 USCA 203 — Definitions

As used in this chapter —

• • • • •

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

• • • • •

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

• • • • •

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organized units. . . . . ."

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person. . . . ."

29 USCA 206 — Minimum wage

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $1.40 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966 not less than $1.60 an hour thereafter, except as otherwise provided in this section:

• • • • •

V.

Statement of the Case

In this cause the facts were almost exclusively uncontroverted. The Employer operates adjoining office buildings in downtown Corpus Christi, Texas. The buildings are occupied by a variety of tenants; lawyers, accountants, geologists, oil companies and operators, lease brokers, doctors, and others (Transcript p. 122-125). There are no tenants of Employer that are engaged in production of goods for commerce and Employer is not so engaged. (Findings of Fact Nos. 23 & 24, App. 70). Although several elevators are self-operating, automatic elevators, there were at all times relevant hereto employed a number of operators for elevators located in one of Employer's buildings, The Wilson Tower.

United States mail and parcel post have been regularly delivered directly to the offices of some of The Wilson Building and The Wilson Tower Building tenants in every week by United States mailmen during the period since February 1, 1967, and in making such deliveries they use the elevators located in said buildings. A portion of such mail and parcel post has been, and is being, mailed to these tenants from points outside the State of Texas (Findings of Fact No. 4, App. 63).

A mailman makes two regular trips per day in The Wilson Tower Building delivering mail. He is inside the elevator about five minutes during each day. He does not deliver mail to all the tenants each day, nor does he get off the elevator on each floor of the building (Findings of Fact No. 9, App. 65).

Freight has been regularly received by tenants in The Wilson Building and The Wilson Tower Building in every week since February 1, 1967. Freight delivered to the ten-

ants in such buildings above the street floor is transported by means of the passenger elevators in such buildings. A portion of such regularly delivered freight has been shipped from places located outside the State of Texas direct to the addressee tenants (Findings of Fact No. 5, App. 63).

The Wilson Tower Buildings has four passenger elevators serving it at the Caranchua Street entrance, which during working days are operated, and have been operated since February 1, 1967, by employees of the Defendant. One elevator can be, and is at night and on Sundays, placed on automatic so no operator is necessary, and it is then operated by the passenger. Ordinarily, from 2,000 to 3,000 passengers travel on The Wilson Tower Building elevators (up and down) each day, five days each week. The passengers are tenants, employees of tenants and clients, customers and other persons doing business with the various tenants (Findings of Fact No. 7, App. 64).

There are nine employees of Defendant who are designated elevator operators operating elevators in The Wilson Tower Building. Elevators which are operated by employee operators carry passengers indiscriminately with no distinction as to the nature of business of the passenger. The postman delivering mail has no priority rights to the use of any of the elevators and he usually rides with other passengers. Passengers have prior right to use of the elevators during business hours over freight and parcel post deliveries. (Findings of Fact No. 8, App. 64).

The time of the operators of the four elevators in The Wilson Tower Building which is taken up solely in carrying interstate freight and mailmen who carry regular mail and parcel post deliveries, is *very small in comparison* to the time required of the operators in connection with the other regular uses of such elevators. (Findings of Fact No. 11, App. 65).

Based on the activities outlined above, the District Court held that "the interstate deliveries of mail, freight and parcel post to The Wilson Tower Building *are sufficiently regular, frequent and substantial in amount to constitute said elevator operators as being engaged in commerce;* and the elevator operators are so closely related to the movement of commerce as to be a part of it." (Findings of Fact No. 11, App. 65) /Emphasis supplied./ The Court further found that the rest of the employees were covered under "the enterprise doctrine" since the employer had more than one employee "in commerce". The Court of Appeals affirmed.

VI.

Federal Jurisdiction

The basis for federal jurisdiction in the District Court was Title 29, Section 117, United States Code.

VII.

Reasons for Granting the Writ

The petition for Writ of Certiorari should be granted in this case because the holding of the Court of Appeals is in conflict with the decision of this Court in *Callas* v. *10 East 40th Street Building, Inc.*, 146 F.2d 438, page 440.

In addition, the petition should be granted as the holding of the Court of Appeals is in conflict with the holding of the Sixth Circuit in *Houchin* v. *Thompson,* 438 F.2d 927 (6th Cir. 1970).

The Conflict with Callus

Although the judgments of the courts below were rathe. sweeping in the number of employees affected, the amount of the sum ordered paid and the various other matters, the actual crux of the problem was a rather narrow question

concerning the duties of a relatively small group of elevator operators.

Under the applicable provisions of the Act all employees of an "enterprise engaged in commerce or in the production of goods for commerce" are covered whether or not an individual employee is so engaged or not. As applicable here, an enterprises engaged "in commerce" or in the production of goods for commerce is defined in Section 203(s) of the Act simply as one which has two or more employees so engaged and which meets certain other tests not important here. So in the Trial Court it came down to the question, did the activities of the elevator operators make The Wilson Building, Inc. "an enterprise engaged in commerce . . ." so as to bring all of the employees under the Act?

The Trial Court found that the elevator operators were "engaged in commerce" (not in the production of goods for commerce) thus triggering coverage for all employees. The narrow question before this Court is, then, were these elevator operators, bu virtue of their activities brought out in evidence, in engaged interstate commerce?

It cannot be too strongly emphasized that *this exact point has been raised and settled numerous times in the Supreme Court, the Fifth Circuit Court of Appeals, and other Federal Courts over the past twenty-eight years. These cases involve exactly the same employees we have here, doing exactly the same work, under exactly the same conditions.*

In the fact of the overwhelming authority to the contrary it seems most unfortunate that the Secretary of Labor continues to relitigate this issue. This is particularly true in view of the complete *void* of any new support for their theory in either case or statutory law.

The Supreme Court, at a very early stage, has occasion to rule on a case involving a fact situation that is in all pertinent respects exactly the same as the one before this Court. *10 East 40th Street Building, Inc.* v. *Callus*, 325 U.S. 578, 65 S. Ct. 1227, 89 L. Ed. 1806 (1945).

This Court, in *Callus,* held that employees engaged in the same activities were not "engaged in commerce: within the meaning of the Fair Labor Standards Act.

The 5th Circuit Court of Appeals, in this case, attempted to distinguish *Callus* on the basis that this Court's holding was based solely on the question of the applicability of the Act due to the *tenants'* activity, rather than the employees' activity, and further determined that this Court did not consider the question of whether elevator operators regularly and frequently carrying passengers carrying interstate mail and freight shipments are themselves engaged in commerce. *Callus* can not be so easily distinguished as this Court disposed of the contention now made by the Secretary of Labor when it determined that the employees in *Callus,* including elevator operators were "not engaged in commerce".

To fully understand the impact of Callus it is necessary to look at two companion cases dealing with elevator operators decided at about the same time.

In *Kirschbaum* v. *Walling,* 316 U.S. 517, 62 S. Ct. 1116, 86 L.Ed. 1638 (1942), a multi-storied building was occupied by tenants that *manufactured* and sold ladies' garments. The employees of the defendant, the building owner and operator, were engineers, carpenters, *elevator operators,* and other maintenance personnel who perform the customary duties of a person charged with the maintenance of a loft building.

The contention made by the Government was that these employees were engaged *"in commerce"*[1] and "the production of goods for commerce". 86 L. Ed 1642-1644.

Further, the Court of Appeals held that the *elevator operators* were engaged *"in commerce"*, 124 F. 2d 572, footnote 5, as well as in the production of goods for commerce. The Supreme Court held that the work of the employees in this particular case had such:

> "... a close and immediate tie with the process of *production for commerce*, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce'." id. p. 1649.

because:

> "Without light and heat and power the tenants could not engage as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity." id. p. 1648.

The Court recognized that the Act was not coextensive with the limits of the power of Congress over commerce and was cognizant of the difficulties in drawing a line between what the Federal Government has taken over for administration and what it has left to the States. It should be noted that the Supreme Court did *not* base its holding on he Government's arguments or the Court of Appeals holding as to being *"in commerce"*.

The Kirschbaum case was followed in *Borden Company* v. *Borella*, 325 U. S. 679, 65 S. Ct. 431 (1945), 89 L. Ed. 1865, *decided the same day as Callus*. The employees of the Borden Company, who *operated the elevators* in and main-

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[1] Emphasis supplied here as elsewhere unless otherwise noted

tained the building which was owned by the company, were held covered by the Act because all of the company's executive officers were in the building. The Court recognized that there was no actual physical production of goods for commerce in the building, but held that the executive officers directing the activities of the company were engaged in the *production of goods* for commerce just as much as those who process and work on the tangible products. Again no mention is made by the Court of the employees being *"in commerce"* although this point had been urged by the employees in their brief, 89 L. Ed. 1867. In this connection it is significant that the Court of Appeals in its opinion in *Borden* stated:

> "(1) Since the decision of the Supreme Court in *McLeod* v. *Threlkeld,* 319 U.S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538, THE PLAINTIFFS DO WELL TO RELY UPON THE SECOND POINT, FOR IT IS CLEAR THAT THEY ARE NOT 'ENGAGED IN COMMERCE'." 145 f.2d 63, p. 64.

In *Callus* the court was faced with a third situation. One in which the building had no manufacturing and was occupied by "the usual miscellany of offices". The court then found that the renting of office space in such a building was "local business" and that the elevator operators and other employees were *not covered.*

When these three Supreme Court cases are read together, the conclusion is inescapable that elevator operators in *typical office buildings* are not covered by the Act as being "in commerce" or "in production of goods for commerce" unless there is some *further element* introduced into the situation as it was in *Borden* and *Kirschbaum.* The basic underpinnings for this conclusion is the Supreme Court's reasoning:

> ". . . we cannot 'be unmindful that Congress in enacting this statute plainly indicated its *purpose to leave local business to the protection of the states'*. We must be alert, therefore, not to absorb by adjudication essentially local activities that congress did not see fit to take over by legislation.
>
> *"Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business* and make the employees of such a building engaged in local business." *10 East 40th Street Building* v. *Callus,* supra.

The Court of Appeals below admitted that the *facts* of the Callus case bears "some similarity" to the present one. (Opinion p. 13) It attempted to distinguish Callus *solely* on the grounds that the issues in the two cases are different.

The court below claims in its opinion that the issue in Callus was whether the elevator operators were "by virtue of the *tenant's*[2] activities engaged in the production of goods for commerce" and that the issue in the present case is whether the elevator operators "*own*[3] activities engage them 'in commerce' ". The "activities" relied on are the presence on the elevators of interstate mail and freight.

Since this is the sole distinction made by the Court of Appeals of a Supreme Court case that in all of its pertinent facts is identical to the present one, the Callus case will be examined in some further detail with this "distinction" in mind.

The District Court in the Callus case noted at the very outset that:

> "The issue is whether the plaintiffs, and others, employed by the defendant, as service and maintenance employees, were *engaged in commerce* or the production of goods for commerce within the meaning of the Act." 51 F. Supp. 528.

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[2] emphasis the court's
[3] emphasis the court's

The District Court then set out the Findings of Fact including:

"(7) Class 2. . . . Orders are taken and are *forwarded by mail* . . . to factory and mines *located in various states*. . . ." id. p. 529

"(7) Class 6 . . . employees of these tenants *prepare plans and sketches in the building for construction projects located in various parts of the United States* . . ."

"(9) An average of 50 to 60 persons, including plaintiffs, engaged as maintenance employees of said office building, have engaged in such capacities as *elevator starters, elevator operators*, window cleaners, watchmen, mechanics and handymen."

"(10) These employees have performed the customary duties incident to the effective maintenance and operation of this office building, such as . . . the operation of elevators carrying tenants and employees, customers and clients of tenants, and other passengers; carrying advertising matter, publicity releases, photographic material, magazine layouts, commercial art drawings, printers' and lithographers' proofs, *construction plans and specifications*, Diesel engine parts, Ediphone machines and parts, samples of merchandise, office furniture and equipment and supplies to and from tenants' premises; . . ."

"(14) Plaintiffs *have not been engaged in* trade, *commerce*, transportation or transmission amoung the several states or from any state to any place outside thereof." id. p. 530

The District Court stated in its Conclusions of Law:

"(2) None of the plaintiffs or any of the other building maintenance employees of the defendant have been engaged *in* interstate *commerce* or in the production of goods for commerce . . ." id. p. 531

The fact recited in detail in the District Court's opinion should be read to fully appreciate the type of activities

there involved. It is hard to imagine the *issues* and *facts* relating to "in commerce" being set forth in a clearer manner.

In *Callus* v. *10 East Fortieth Building* 146 F. 2d 438 (1944), the Court of Appeals for the Second Circuit reversed the District Court and held its prior decision in *Borella* v. *Borden Co.* 145 F. 2d 63 (1944), controlled. The record before the Court of Appeals had the pleadings alleging the employees were "in commerce" and were engaged "in the production of goods for commerce", and also had the District Court's findings that the elevators carried passengers and goods, and Conclusions of Law that none of the plaintiffs were engaged "in commerce" or "in the production of goods for commerce". *The Court of Appeals affirmed the District Court on its holding that the elevator operators and other employees were not engaged in commerce;* however, it reversed on the ground that they were by statutory definitions engaged in production of goods:

> "(1) The plaintiffs' suit is based on the theory that they are 'engaged in the production of goods for (interstate) commerce'. *They cannot effectively contend that they are 'engaged in (interstate) commerce'.* McLeod v. Threlkeld, 319 U.S. 491, . . ."

The *Callus* case then moved to the Supreme Court as *10 East 40th Street Building, Inc.* v. *Callus,* supra, on the record showing the elevator operators close relation to persons engaged in commerce and, necessarily, to mail and goods "in commerce".

The elevator operator plaintiffs alleged and proved they were transporting and carrying goods and persons in commerce and *claimed* they were "engaged in commerce", and these employees plaintiffs argued to the Supreme Court that on these facts they were "in commerce", yet both the District Court and the Court of Appeals had held the em-

ployee plaintiffs were not "in commerce". In the brief before the Supreme Court employee plaintiffs argued:

> "Application of the act does not depend upon the *percentage or volume of goods moving in commerce* to which employees' activities specifically relate. It is sufficient if the record indicates that the flow is not casual, sporadic, or utterly inconsequential.
>
> • • •
>
> *"The volume of business in commerce* to which the work of these respondents immediately related was more than that to which courts would apply the maxim "de minimis'." 89 L. Ed. 1808-1809.

The United States Government intervened and filed and argued the case before the Supreme Court urging affirmance. In the Government's brief it argued:

> "An employee's duties, to fall within the Act, need not be entirely or principally devoted *to commerce* or to the production of goods for commerce.
>
> • • •
>
> "An employee is within the protection of the act if the interstate transactions to which is duties are necessary constitute a regular part of the business and are not inconsequential or sporadic." id. p. 1809 (Emphasis supplied)

With these contentions before it, the Supreme Court reasoned and held in *Callus*:

> "The case immediately before us presents still a third situation differing both from Kirschbaum and Borden.
>
> • • •
>
> "The respondents are maintenance employees of the building, *elevator starters and operators,* window cleaners, watchmen and the like. They brought this

> suit under Sect. 16(b) of the Fair Labor Standards Act, 29 USCA Sect. 215, 9 FCA title 29, Sect. 215, for claims of overtime payment to which they are entitled if their occupations be deemed 'necessary to the production' of goods for commerce. *Obviously they are not 'engaged in commerce'.*" id. p. 1811

Thus we have the District Court, the Circuit Court and the Supreme Court each ruling that employees, *in no way* different than those involved here, were not "in commerce".

About the most that can be said of any "distinction" from the *Callus* case is that the case does not set out any *specific claim* on the part of the employees based on interstate mail or freight being carried on the elevators. However, in view of the findings of fact by the District Court as to the activities of the employees, it is simply incredible to imagine that some such *specific claim* would have changed the court's holding or that the case is distinguishable as not being in point.

The holding in *Callus* was obviously made on much broader policy consideration as set out in *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, 80 S.Ct. 739, 4 L.Ed.2d 753 (1960) in its discussion of the Callus cases:

> "Regardless of the governing principle that coverage turns upon the nature of the employees' duties, and not upon the nature, local or interstate, of the employer's general business, WE HELD THE CASE DISTINGUISHABLE FROM BORDEN AND KIRSCHBAUM BECAUSE THE EMPLOYMENT, SINCE PART OF AN ENTERPRISE WHICH 'SPONTANEOUSLY SATISFIES THE COMMON UNDERSTANDING OF WHAT IS LOCAL BUSINESS', WAS ITSELF SUFFICIENTLY DIFFERENT, DESPITE IDENTICAL EMPLOYEE DUTIES, from prior cases to justify regarding it as separate from the 'necessary parts of a commercial process' which are within the Act."

The above analysis is not that of the writer alone, but has been accepted by every Federal Court of Appeals that has passed on the question since *Callus* until the recent switch by the 5th Circuit Court. See *Johnson* v. *Dallas Downtown Development Co.*, 132 F.2d 287 (C.A. 5, 1942) cert.den., 318 U.S. 790, 63 S.Ct. 944, 87 L.Ed. 1156 (1943), and *Tobin* v. *Girard Properties*, 206 F.2d 524 (C.A. 5, 1953).

The District Court, the Court of Appeals and the Supreme Court each determined and held in the *Callus* case that employees of a multitenant office building performing the usual and "customary duties incident to the effective maintenance and operation of the office building" were not "engaged in commerce" within the meaning of the Fair Labor Standards Act. The 5th Circuit's "distinction" should be reviewed by this Court and a petition for a writ of certiorari should be granted for this purpose.

Conflict with Houchin

The recent 6th Circuit case of *Houchin* v. *Thompson*, 438 F.2d 927 (C.A. 6, 1970) is in direct conflict with the 5th Circuit Court of Appeals on the involved point. This is admitted in the opinion by the 5th Circuit. The facts in the two cases are identical and the holdings are squarely in conflict. This Court should resolve the conflict by granting the petition for the writ of certiorari in this case.

VIII.

Conclusion

The holding of the District Court and the Court of Appeals has substantially broadened coverage of the Fair Labor Standards Act to employees of office buildings in direct conflict with the rule laid down by this Court in *Callus* and followed by the Sixth Circuit in *Houchin.*

This court should grant the petition for the writ of certiorari and determine the question raised on this important and broad sweeping issue by the applicability of the Act to these circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I George T. Barrow, hereby certify that on the ... day of ....., 1973, a copy of the foregoing Petition for Writ of Certiorari was delivered to the following persons by placing the same in the United States mail, certified, return receipt requested, with the proper postage thereon:

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.....
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Appendix A
Part 1

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1813

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

v.

THE WILSON BUILDING, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

(April 27, 1973)

Before BROWN, Chief Judge, MOORE* and RONEY, Circuit Judges.

MOORE, Circuit Judge: In this appeal we are asked to decide whether certain building service employees of the appellant-employer are engaged in commerce for purposes of the Fair Labor Standards Act (FLSA)[1] and

* Hon. Leonard P. Moore, Senior Circuit Judge of the Second Circuit, sitting by designation.

[1] 29 U.S.C. § 201 *et seq.*, as amended.

whether said employees are therefore covered by the Act's minimum wage and other provisions.

The action was brought by the Secretary of Labor pursuant to Section 17 of the Act[2] to enjoin appellant Wilson Building, Inc. ("the employer"), from violating the Act's minimum wage,[3] overtime,[4] and record-keeping[5] requirements and to compel payment, with interest, of compensation owing to the employer's building maintenance personnel. The employer admits that it paid the named employees less than the prescribed federal minimum wage during the period in question (1967-70),[6] that it failed to pay them the prescribed premium for overtime work, and that its book-keeping records did not satisfy the Act's requirements. The employer, however, (1) denies that its payment and record-keeping practices were unlawful, arguing that it was not subject to the Act's requirements because it is a purely local business, and (2) urges that the district court erred in finding that the activities of the service employees engaged them in commerce for purposes of the FLSA. Concluding that appellant's elevator opera-

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[2] 29 U.S.C. § 217.

[3] 29 U.S.C. § 206(b).

[4] 29 U.S.C. § 207(a)(2).

[5] 29 U.S.C. § 211(c).

[6] The prescribed minimum wage during the years in question was as follows:

Feb. 1, 1967 to Jan. 31, 1968	$1.00
Feb. 1, 1968 to Jan. 31, 1969	$1.15
Feb. 1, 1969 to Jan. 31, 1970	$1.30
Feb. 1, 1970 to Jan. 31, 1971	$1.45

29 U.S.C. § 206(b).

tors were engaged in commerce under 29 U.S.C. § 203(b),[7] and that appellant was an "enterprise engaged in commerce" under 29 U.S.C. § 203(r) — (s)(1),[8] the district

> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

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[7] Section 203(b) provides:

[8] Section 203(r) provides, in relevant part:

> (r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided*, That, within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise, by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact it occupies premises leased to it by a person who also leases premises to other retail or service establishments. * * *

Section 203(s) provides, in relevant part:

> (s) "Enterprise engaged in commerce or in the production of goods for commerce" means as enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which —
>
> (1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated); * * *.

court ruled that appellant had violated the Act and granted the relief sought by the Secretary. The district court's opinion is reported at 320 F. Supp. 664 (S.D. Tex. 1970). We affirm.

I.

The relevant facts are not in dispute. Appellant is a Texas corporation doing business in Corpus Christi. It has offices in that city at 1701 Wilson Tower Building which, together with the adjoining Wilson Building (also an office building), the Wilson Tower Garage, and two parking lots, appellant owns and operates for profit. The office buildings are occupied by a miscellany of tenants, including lawyers, doctors, accountants, geologists, oil companies, lease brokers, and others. The buildings and parking facilities are maintained by various of appellant's service employees including (1) elevator operators, (2) maintenance employees (*e.g.*, carpenters, mechanics, and plumbers) and (3) janitors and maids. The district court's findings as to each category of employees were as follows.

Elevator Operators. — Nine employees regularly operate the four elevators in the seventeen-story Wilson Tower Building. All four elevators transport passengers as well as persons delivering interstate mail, parcel post, and freight. Mail is delivered to the tenants twice daily, parcel post two or three times daily, and freight is delivered regularly each week to various tenants. The district court found that although the time devoted by the elevator operators to carrying postmen and freight deliverymen is small in comparison to the time devoted to the carrying of other passengers,[9]

[9] In *Montalvo* v. *Tower Life Bldg.*, 426 F.2d 1135, 1143 (5th Cir. 1970) we held that "an employee may be engaged in commerce or in the production of goods for commerce within the meaning of the [FLSA] even though the time he devotes to the interstate activity is small in amount."

"the interstate deliveries of mail, freight and parcel post to The Wilson Tower Building are sufficiently regular, frequent, and substantial in amount to constitute said elevator operators as being engaged in commerce; and the elevator operators are so closely related to the movement of commerce as to be a part of it." 320 F. Supp. at 666.

Maintenance Employees. — These employees remodel office space in appellant's two buildings and perform general carpentry and repair work for the benefit of tenants. The remodeling work is done at the request of tenants, pursuant to the rental agreement, subject to the approval of appellant. The lower court found that a substantial portion of the materials installed and supplies handled by the maintenance employees, such as the lumber used for wall paneling, doors, etc., is manufactured outside the state of Texas. 320 F. Supp. at 667. In addition, mechanics and plumbers maintain the air conditioning and heating systems in the buildings, and they, as do the other maintenance employees, handle replacement parts and goods which are manufactured out of state.

Janitors and Maids. — These employees perform custodial services for the benefit of tenants, as required by the rental agreement between tenants and appellant. Their work includes cleaning offices and hallways, stocking restrooms with soap, paper towels, and toilet paper, and replacing light bulbs and fluorescent lamps throughout the buildings. The district court found that a substantial quantity of the electrical and janitorial supplies handled by the janitors and maids is manufactured out of state.

As noted, the district court concluded that the elevator operators' transportation of mail, parcel post, and freight is regular, frequent, and substantial enough to render the operators "engaged in commerce" within the meaning of the Act, thus satisfying the requirement of Section 203(s)

that appellant's enterprise have employees engaged in commerce. Regarding the maintenance employees, janitors, and maids, however, the court concluded that even though they handle products which have travelled interstate, they are not engaged in commerce because the products do not meet the Act's Section 203(i) definition of "goods".[10] The court determined that "such materials when handled and worked on by [appellant's] employees are in the hands of the ultimate consumer," *i.e.*, appellant, and that they therefore are out of the flow of commerce. 320 F. Supp. at 669. By virtue of the elevator operators' engagement in commerce, however, the court ruled that the other named employees are employed in an enterprise engaged in commerce and that they too are entitled to the benefits of the Act.

On appeal both appellant and the Secretary find fault with the district court's decision. Appellant argues that the court erred in finding that the elevator operators are engaged in commerce and in ruling that all the employees in question are covered by the Act's enterprise doctrine. The Secretary, while agreeing with the court's result, argues that the court erred by not ruling that the activities of the maintenance and janitorial employees provide independent grounds for sustaining enterprise coverage under the Act. Since we are of the opinion that the elevator operators are engaged in commerce within the meaning of Section 201(s) we need not, and do not, reach the question whether the activities of the other employees provide an independent ground for finding engagement in commerce; under the

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[10] 29 U.S.C. § 203(i) defines goods as follows:

> (i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

Act's enterprise doctrine[11] they are entitled to the benefits prescribed by the FLSA.

II.

We begin our analysis of the question whether appellant's elevator operators are engaged in commerce mindful of Mr. Justice Frankfurter's exhortation that the "search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is as rewarding as an attempt to square the circle." *A. B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 520 (1942). In that case the Court, as it has in numerous cases since, recognized that application of the FLSA to an infinite number of industrial and commercial situations is essentially a line-drawing exercise, and that in delineating between areas of activities regulated by the Act and those left to state regulation courts should be guided by the fixed points of national policy, legislative history, and administrative practicalities. 316 U.S. at 523. Writing as we do thirty years after *Kirschbaum*, we are aided by a fourth guideboard — the long line of judicial decisions which have construed the outer reaches of the Act. We need not dwell on points which, by now, the cases have rendered irrefutable, although we do well to note at the outset the fundamental precepts that influence our reasoning in the present appeal. Thus, for example, it has been firmly established that the phrase "engaged in commerce" within the meaning of Section 203 of the FLSA is to be given a broad, liberal construction rather than a strained, technical one in order to effectuate the Act's purposes, *Mitchell* v. *C. W. Vollmer & Co., Inc.*, 349 U.S. 427, 429 (1955); *Mitchell* v. *Lublin, McGaughy & Assoc.*, 358 U.S.

[11] For discussion of the 1961 amendments to the FLSA, which added the "enterprise doctrine" to the Act's provisions, *see* Note, 9 *B.C. Ind. & Com. L. Rev.* 487, 489-90 (1968); Note, 41 *Notre Dame Lawyer* 596, 597-99 (1966).

207, 211 (1959); *Shultz;* v. *Mack Farland & Sons Roofing Co., Inc.,* 413 F.2d 1296, 1300 (5th Cir. 1969); that the Act has a remedial and humanitarian purpose, *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda Local No. 123,* 321 U.S. 590, 597 (1944); *Mitchell* v. *Ballenger Paving Co., Inc.,* 799 F.2d 297, 301 (5th Cir.), *cert. denied,* 370 U.S. 922 (1962), which was designated to provide a minimum standard of living necessary for the health efficiency, and general well-being of workers (29 U.S.C. § 202(a)), as well as to prescribe certain minimum standards for working conditions, *Wirtz* v. *Ti Ti Peat Humus Co., Inc.,* 373 F.2d 209, 212 (4th Cir.), *cert. denied* 389 U. S. 834 (1967); and that Congress intended the Act "to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce," *Walling* v. *Jacksonville Paper Co.,* 317 U.S. 564, 567-68 (1943); *see Wirtz* v. *Columbian Mutual Life Ins. Co.,* 380 F.2d 903, 907 (6th Cir. 1967). Moreover, practical considerations, and not technical conceptions, guide us in determining coverage of the Act, and the "crucial test is the nature of the activities of the employee, rather than the general character of the employer's business," *Wirtz* v. *Wohl Shoe Co.,* 382 F.2d 848, 850 (5th Cir. 1967). With these principles in mind, we turn to the activities of the elevator operators in the present appeal, and to the narrow issue of whether these activities engage the operators in commerce.

III.

Section 203(b) of the FLSA defines commerce as including "trade, commerce, *transportation,* transmission, or communication among the several States" (emphasis added). In support of his position that the elevator operators are engaged in commerce because they transport interstate mail and freight which continue to flow in commerce until delivered to the offices of the tenants, the Secretary points to

numerous decisions holding that employees whose duties are directly related to the transportation of goods in interstate commerce are themselves engaged in commerce within the meaning of the Act. Our attention is directed specifically to the line of cases beginning with *Walling* v. *Jacksonville Paper Co., supra.*[12]

In *Jacksonville Paper Co.* the Supreme Court held that the FLSA was applicable to employees (truck drivers) of a wholesale paper company who transported from company warehouses within the state to retail stores also within the state interstate goods that had temporarily been detained at such warehouses. After noting that "the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce," (317 U.S. at 567) the Court ruled that the interstate journey of the goods did not end, and the goods thus did not cease to flow in commerce, until they reached their final destina-

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[12] *See also, Mitchell* v. *Sunshine Dep't Stores, Inc.*, 292 F.2d 645, 647-49 (5th Cir. 1961) (employees, including elevator operators, handling and storing interstate merchandise at warehouse before distribution to local retail stores held to be engaged in commerce); *Mitchell* v. *Royal Baking Co.*, 219 F.2d 532, 533-34 (5th Cir. 1955) (where we held that various employees handling goods shipped from out of state, including workers unloading and carrying same into warehouse, were engaged in commerce); *Fleming* v. *A.B. Kirschbaum Co.*, 124 F.2d 567, 571-72 (3d Cir. 1941), *aff'd sub nom. A.B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517 (1942) (elevator operators employed by owner who leased his building to tenants, some of whom manufactured goods shipped interstate, were directly engaged in commerce by carrying in elevators the finished products); *McComb* v. *W.E. Wright Co.*, 168 F.2d 40, 42 (6th Cir.), *cert. denied*, 335 U.S. 854 (1948) (employees who spent 25% of their time unloading and storing both intrastate and interstate (15% of total) goods engaged in commerce); *Sucrs. de A. Mayol & Co., Inc.* v. *Mitchell*, 280 F.2d 477, 480-81 (1st Cir.), *cert. denied*, 364 U.S. 902 (1960) (employees, including elevator operators and janitorial personnel, who received and stored goods within warehouse held to be engaged in commerce); *McComb* v. *Herlihy*, 161 F.2d 568, 570-71 (4th Cir. 1947); *Clyde* v. *Broderick*, 144 F.2d 348, 351 (10th Cir. 1944).

tion — the retail stores ("there is a practical continuity of movement of the goods until they reach the customers for whom they are intended"), 317 U.S. at 568. The Court then stated:

> The fact that all of respondent's business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character of the employees' work [citation omitted]. If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act. 317 U.S. at 571-72.

It is plain to us that the goods transported by appellant's elevator operators (mail, parcel post and freight) continue to flow in interstate commerce beyond the lobby of the office buildings, where appellant argues the journey technically ends, and that they do not come to rest until delivered to the offices of the tenants. Furthermore, it is plain that without the labor provided by the elevator operators in transporting the mail and freight deliverymen throughout the building, the interstate goods would not be delivered to their intended recipients in each office. Appellant urges, however, that the activities of the elevator operators, even though related to the movement of goods traveling interstate, cannot be deemed to engage them in commerce since its business is strictly local in scope. This argument fails, however, in light of the numerous cases holding that applicability of the Act depends not on the character of the employer's business, but on the nature of the employee's work. *See e.g., Jacksonville Paper Co., supra,* 317 U.S. at 571-72; *Mitchell* v. *Lublin, McGaughy & Assoc., supra,* 358 U.S. at 211.

Although we have not heretofore ruled on the precise question posed here, namely, whether elevator operators transporting mail and freight in an office building are en-

gaged in commerce, we have had occasion to determine whether elevator operators engaged in other activities satisfied the Act's coverage requirements. *See, e.g., Mitchell* v. *Sunshine Dep't Stores, Inc.*, 292 F.2d 645, 647, 648 (5th Cir. 1961); *accord, Sucrs. de A. Mayol & Co., Inc.* v. *Mitchell*, 280 F.2d 477, 480-81 (1st Cir.), *cert. denied*, 364 U.S. 902 (1960); *Fleming* v. *A. K. Kirschbaum Co.*, 124 F.2d 567, 571-72 (3d Cir. 1941), *aff'd sub nom. A. B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517 (1942). *But cf. Johnson* v. *Dallas Downtown Dev. Co.*, 132 F.2d 287 (5th Cir. 1942), *cert. denied*, 318 U.S. 790 (1943); *Tobin* v. *Girard Properties, Inc.*, 206 F.2d 524, 526 (5th Cir. 1953).

In *Sunshine Dep't Stores, supra,* the elevator operators, who were also warehouse employees, received, transported and stored shipments of interstate merchandise. The goods were delivered to the company's warehouse by independent carriers who deposited them at the foot of an elevator. The carriers placed the goods on the elevator; the remainder of the time they were so placed by Sunshine's warehouse employees, some of whom then transported the goods by elevator to the second floor of the warehouse. 292 F.2d at 646. We held that the employees (elevator operators) so handling the goods were engaged in commerce within the meaning of the FLSA. 292 F.2d at 648.

In *Kirschbaum, supra,* the Third Circuit on facts similar to those of *Sunshine Dep't Stores* noted that elevator operators were "directly engaged in commerce, for although their activities take place entirely within the state they carry out one step in the actual transportation of the goods to points outside the state." 124 F.2d at 572 n.5. *Accord, Schultz* v. *Blaustein Industries, Inc.*, 321 F. Supp. 998, 1008 (D. Md. 1971) ("elevator operators • • • who regularly and recurrently carried postmen delivering mail and persons deliver-

ing materials moving in interstate commerce • • • were engaged in commerce"); *Wirtz* v. *Columbian Mutual Life Ins. Co.*, 246 F. Supp. 198, 208 (W.D. Tenn. 1965), *affirmed*, 380 F.2d 903 (6th Cir. 1967).

Appellant relies primarily on two decisions, one of which is distinguishable from the facts of the present appeal, *10 East 40th Street Building, Inc.* v. *Callus*, 325 U.S. 578 (1945), and the other with which we disagree, *Houchin* v. *Thompson*, 438 F.2d 927 (6th Cir. 1970). Although the facts in *Callus* bear some similarity to those of the present appeal, that case is not controlling because the issue there was whether building maintenance employees were, by virtue of the *tenants'* activities engaged "in the production of goods for commerce", and not whether, as here, the employees' *own* activities engage them "in commerce." Since *Callus* did not consider the question whether elevator operators regularly and frequently carrying interstate mail and freight shipments are themselves engaged in commerce the case is not helpful.[13] We similarly distin-

[13] Similarly distinguishable are two of our own past decisions dealing with elevator operators that relied on the *Callus* decision, *Johnson* v. *Dallas Downtown Dev. Co.*, 132 F.2d 287 (5th Cir. 1942), and *Tobin* v. *Girard Properties, Inc.*, 206 F.2d 524 (1953). Neither case controls the present appeal because in neither case was the issue raised whether elevator operators transporting interstate mail and freight are engaged in commerce. In *Johnson* the issue was whether six elevator operators whose duties appeared to be limited to carrying passengers up and down the building were *engaged in the production of goods for commerce* by virtue of the *tenants'* activities a question we answered in the negative, 132 F.2d at 289. In *Tobin*, various employees of an office building owner, including elevator operators, mechanics, janitors, and building maintenance engineers, argued that they were engaged in commerce on the ground that their work in a building 70% occupied by a tenant engaged in interstate commerce, the Southwestern Bell Telephone Co., was "an integral part of the operation of the telephone company's interstate system." 206 F.2d at 526. After noting that the test for determining whether an employee is engaged in commerce "is not whether the employees' activi-

guished *Callus* in our recent decision in *Hodgson* v. *Travis Edwards, Inc.*, 465 F.2d 1050, 1053-54 (5th Cir.), *cert. denied*, 41 U.S.L.W. 3346 (U.S. Dec. 19, 1972), where we held that the employees of an office building corporation who regularly mailed monthly reports to out of state corporate officers were engaged in commerce or in the production of goods for commerce within the meaning of the Act. 465 F.2d at 1054. We were there persuaded that even though the monthly reports may have had no intrinsic value and were for internal corporate use only, their preparation and subsequent mailing by the office employees were sufficient to meet the Act's definition of commerce, *i.e.*, " • • • transportation, transmission, or communication • • •" among the states. And since the activities of the office employees clearly engaged them in commerce, we held that the other building employees, including maintenance personnel, parking lot attendants, and a single maid/elevator operator, were employed in a covered enterprise and thus entitled to the benefits of the Act. 465 F.2d at 1052. If, as in *Travis Edwards*, the preparation and mailing of monthly reports to corporate directors and officers living out of state engage those sending the reports "in commerce" then, *a fortiori*, those involved directly in the transportation of the

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ties affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the *movement* of the commerce as to be a part of it," 206 F.2d at 527 (emphasis added), and noting that the decision in each case must turn upon its own peculiar facts, *id.* at 528, we held that the various employees were not engaged in commerce because their activities were too remote from the "in commerce" activities of the tenant telephone company, *id.* at 527-28. As far as we determine, in *Tobin* it was neither alleged nor argued that the elevator operators regularly and frequently transported mail and freight deliverymen as part of their regular duties. Since neither *Johnson* nor *Tobin* considered that issue, which is the central issue in the present appeal, those two decisions, relying on *Callus*, are, like the decision in *Callus*, readily distinguishable.

mail (the elevator operators in the instant appeal) are also engaged in commerce.

To the extent that appellant's other principal case, *Houchin* v. *Thompson*, *supra*, conflicts with our reasoning in *Travis Edwards*, *supra*, and because that decision attempts to revitalize the *de minimis* doctrine in FLSA cases (438 F.2d at 928-29)[14] which has been discredited by the Supreme Court in *Maryland* v. *Wirtz*, 392 U.S. 183, 192-93 (1968),[15] and by this Court in *Schultz* v. *Kip's Big Boy, Inc.*, 431 F.2d 530, 535 (5th Cir. 1970),[16] we reject the Sixth Circuit's rationable in *Houchin*.

IV.

In keeping with the Act's remedial and humanitarian

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[14] The Court in *Houchin* stated:

> "Where some inconsequential incident of interstate commerce happens to result from the general conduct of a fundamentally intrastate business, the rule of de minimis is applicable and the Act does not apply."
> 438 F.2d at 928-29 (citation omitted)

[15] "The only question for the courts is then whether the class [of employee activities affecting commerce] is 'within the reach of the federal power.' The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest." 392 U.S. at 192-93 (citations and footnote omitted)

[16] It was argued in *Kip's Big Boy*, as it was in *Houchin*, that the amount of time devoted by the employees to their "commerce" activities was "inconsequential" or only "occasional." We said, 431 F.2d at 535, that the *regularity* of the employee doing assigned interstate work which is necessary to the normal operation of the purely intrastate business should determine if the employee is substantially engaged in interstate commerce, not the exact number of hours spent, for if Kip's Big Boy were not able to receive and store its shrimp, etc. when they were regularly received, it would *substantially* damage the business. Moreover, this court has held * * * that the provisions of the Act apply to employees who spend one percent of their time in commerce. (footnote, citations omitted, emphasis added to the word "regularity.")
See also Montalvo v. *Tower Life Bldg.*, *supra* note 9.

purposes, and consistent with the Congressional intent of extending coverage under the Act to the farthest reaches of the channels of interstate commerce, *see Jacksonville Paper Co., supra*, 317 U.S. at 567-68, the district court correctly, we think, analogized the labor of elevator operators transporting mail and freight to the labor of truck drivers transporting interstate goods between two points in the same state.[17] See *Wirtz* v. *McClure*, 333 F.2d 45, 46 (10th Cir. 1964); *Jacksonville Paper Co., supra*, 317 U.S. at 567. We agree with the district court and the Secretary that both activities satisfy the "transportation" requirement in the Act's definition of commerce.[18]

In the context of another Fair Labor Standards Act controversy the Supreme Court, per Mr. Justice Harlan, ruled that "the considerable discretion possessed by the Secretary as the one responsible for the actual administration of the Act should not be understressed." *Idaho Sheet Metal Works, Inc.* v. *Wirtz*, 383 U.S. 190, 205, *reh. denied*, 383 U.S. 963 (1966). This Court is guided by that precept for, as in all matters regulated by a Congressionally authorized agency, judicial line-drawing in countless possible industrial and commercial situations should begin with deference to the expertise of the agency or administrator involved, especially in questions pertaining to the labor laws. See *Phelps*

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[17] In his Memorandum and Order dated August 14, 1969, the district court said (*see* Transcript, at 224-25):

> The court is satisfied that construing section 203(s) to include defendant's elevator operators is in accordance with this intent and purpose of the Act. The relationship between these elevator operators and the interstate freight carried in the elevators is interestingly similar to that between truck drivers and their interstate load. In each case the only real relationship between the operator and the load being conveyed is the operation of the means of conveyance involved. And the operator of the motor vehicle is clearly covered by the Act.
>
> (citations omitted).

[18] See note 7 *supra*.

Dodge Corp. v. *NLRB*, 313 U.S. 177, 194 (1941); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). Having thus considered the relevant case law, Congressional intent, and administrative practicalities, and believing as we do that the FLSA should be given a liberal interpretation, consistent with Congressional intent in favor of finding coverage, we hold that appellant's elevator operators are engaged in commerce. Since appellant is thereby a covered "enterprise" under the FLSA, the other named employees are also entitled to the minimum wage and overtime benefits of the Act.

The judgment is AFFIRMED.

Appendix A
Part 2

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1972

No. 71-1813

D. C. DOCKET No. 69-C-52

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

v.

THE WILSON BUILDING, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

Before BROWN, Chief Judge, MOORE* and RONEY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

April 27, 1973

Issued as Mandate:

* Hon. Leonard P. Moore, Senior Circuit Judge of the Second Circuit, sitting by designation.

Appendix A
Part 3

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1813

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

v.

THE WILSON BUILDING, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING
(MAY 22, 1973)

Before BROWN, Chief Judge, MOORE* and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

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* Hon. Leonard P. Moore, Senior Circuit Judge of the Second Circuit, sitting by designation.

Appendix B
Part 1

GEORGE P. SHULTZ, *Secretary of Labor,*
UNITED STATES DEPARTMENT OF LABOR

v.

THE WILSON BUILDING, INC.,
A CORPORATION.

CIVIL ACTION No. 69-C-52

United States District Court,
S. D. Texas, Corpus Christi Division.
August 27, 1970.

Action was brought by Secretary of Labor to enjoin violation of Fair Labor Standards Act by corporation. The District Court, Seals, J., held that defendant office building owner and manager was an enterprise engaged in commerce or in the production of goods for commerce within the meaning of Fair Labor Standards Act and violated the minimum wage and overtime compensation provisions thereof, entitling Secretary of Labor to an injunction permanently enjoining defendant corporation from violating the provisions of Act and restraining the withholding of payment of minimum wage and overtime compensation found to be due employees, together with interest at the rate of 6%.

Judgment for plaintiff.

1. Labor Relations — 1141

Materials handled by janitors, maids, maintenance employees and mechanical engineers employed by corporation engaged in ownership and operation of office building and parking lots were not "goods" within definition of Fair Labor Standards Act because such materials when handled and worked on by such employees were in the hands of ultimate consumer. Fair Labor Standards Act of 1938, § 3(i), (s) (5), 29 U.S.C.A. § 203(i), (s) (5).

See publication Words and Phrases for other judicial constructions and definitions.

2. Labor Relations — 1164

Office building owner's elevator operators were engaged in commerce within meaning of Fair Labor Standards Act where the interstate deliveries of mail, freight and parcel post to office building were regular, frequent, and in substantial amount. Fair Labor Standards Act of 1938, § 3(b), 29 U.S.C.A. § 203(b).

3. Labor Relations — 1145

Office building owner and operator was engaged in related activities performed through unified operation and common control for a common business purpose and as such was an "enterprise" within meaning of Fair Labor Standards Act. Fair Labor Standards Act of 1938, § 3(r), 29 U.S.C.A. § 203(r).

See publication Words and Phrases for other judicial constructions and definitions.

4. Labor Relations — 1145, 1597, 1600

Defendant office building owner and manager was an an enterprise engaged in commerce or in the production of goods for commerce within meaning of Fair Labor Standards Act and had violated the minimum wage and overtime compensation provisions thereof, entitling Secretary of Labor to an injunction permanently enjoining defendant corporation from violating the provisions of Act and restraining the withholding of payment of minimum wage and overtime compensation found to be due employees, together with interest at the rate of 6%. Fair Labor Standards Act of 1938, §§ 3(r), (s) (1), 6, 7, 11(c), 15(a) (2, 5), 29 U.S.C.A. §§ 203(r), (s) (1), 206, 207, 211(c), 215(a) (2, 5).

M. J. Parmenter and William E. Everheart, U. S. Dept. of Labor, Dallas, Tex., for plaintiff.

Owen D. Cox, Boone, Davis, Cox & Hale, Corpus Christi, Tex., for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SEALS, District Judge.

The Secretary of Labor, United States Department of Labor brought this action to enjoin defendant from violating the provisions of sections 15(a) (2) and 15(a) (5) of the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.), hereinafter referred to as the Act, and to restrain the withholding by defendant of payment of any minimum wage and overtime compensation found by the court to be due defendant's employees under the Act, together with interest thereon at the rate of six per cent per annum from the dates said amounts became due.

This cause having been tried before the court and having considered the pleadings, discovery, stipulations, exhibits, oral testimony of witnesses, and statements of counsel, the court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Defendant, at all times since February 1, 1967, has been a corporation having its principal office and place of business at 1701 Wilson Tower Building, Corpus Christi, Nueces County, Texas.

2. Defendant, during the period since February 1, 1967, has been engaged in the ownership and management of The Wilson Building and The Wilson Tower Building, and during the period since August 1, 1967 has been engaged in the operation of The Wilson Tower Garage and two (2)

parking lots, all of which are located in Corpus Christi, Texas.

3. Defendant's annual gross volume of business done for each of the years 1966, 1967 and 1968, was in excess of $500,000, and its annual gross volume of business done for year 1969 was in excess of $250,000.

4. United States mail and parcel post have been regularly delivered directly to the offices of some of The Wilson Building and The Wilson Tower Building tenants in every week by United States mailmen during the period since February 1, 1967, and in making such deliveries they use the elevators located in said buildings. A substantial portion of such mail and parcel post has been, and is being mailed to these tenants from points outside the State of Texas.

5. Freight has been regularly received by tenants in The Wilson Building and The Wilson Tower Building in every week since February 1, 1967. Freight delivered to the tenants in such building above the street floor is transported by means of the passenger elevators in such buildings. A substantial portion of such regularly delivered freight has been shipped from places located outside the State of Texas direct to the addressee tenant.

6. There are two passenger elevators serving the Broadway Street entrance and two passenger elevators serving the Leopard Street entrance to The Wilson Building. There are no employee operators for the elevators at the Broadway Street entrance or at the Leopard Street entrance of said building. There is no starter for these self-operating elevators. The automatic elevators are operated by the mailman in making regular deliveries and by mailmen for parcel post and also by delivery men making freight deliveries.

7. The Wilson Tower Building has four passenger elevators serving it at the Carancahua Street entrance, which during working days are operated, and have been operated since February 1, 1967, by employees of the defendant. One elevator can be, and is at night and on Sundays, placed on automatic so no operator is necessary, and it is then operated by the passenger. Ordinarily, from 2,000 to 3,000 passengers travel on The Wilson Tower Building elevators (up and down) each day, 5 days each week. The passengers are tenants, employees of tenants and clients, customers and other persons doing business with the various tenants.

8. There are nine employees of defendant who are designated elevator operators operating elevators in The Wilson Tower Building. Elevators which are operated by employee operators carry passengers indiscriminately with no distinction as to the nature of business of the passenger. The postman delivering mail has no priority rights to the use of any of the elevators and he usually rides with other passengers. Passengers have prior right to use of the elevators during business hours over freight and parcel post deliveries.

9. A mailman makes two regular trips per day in The Wilson Tower Building delivering mail. He is inside the elevator about five minutes during each day. He does not deliver mail to all the tenants each day, nor does he get off of the elevator on each floor of the building.

10. The ground-floor tenants in The Wilson Building and The Wilson Tower Building have outside entrances and a few have entrances from the building ground-floor lobbies. The employees of such tenants and their customers do not use the elevators to reach the offices of such tenants, nor are the elevators used to deliver regular mail, parcel post packages, and freight to such tenants.

11. The time of the operators of the four elevators in The Wilson Tower Building which is taken up solely in carrying interstate freight, and mailmen who carry regular mail and parcel post deliveries, is very small in comparison to the time required of the operators in connection with the other regular uses of such elevators. But the interstate deliveries of mail, freight and parcel post to The Wilson Tower Building are sufficiently regular, frequent and substantial in amount to constitute said elevator operators as being engaged in commerce; and the elevator operators are so closely related to the movement of commerce as to be a part of it.

12. Defendant employs individuals who do janitorial work in both The Wilson Building and The Wilson Tower Building, such as cleaning the various offices which are occupied by tenants, cleaning and waxing hallways, washing windows, keeping restrooms clean and stocked with soap, toilet paper and paper towels, emptying wastebaskets, vacuuming rugs, and similar types of work. All such services are performed for the benefit of the tenants in the two buildings and are required by defendant's rental agreements, either directly or indirectly.

13. Defendant employs individuals who do maid work in both The Wilson Building and The Wilson Tower Building, such as cleaning the various offices which are occupied by tenants, keeping restrooms clean and stocked with soap, toilet paper and paper towels, emptying wastebaskets and dusting. All such services are performed for the benefit of the tenants in the two buildings and are required by defendant's rental agreements, either directly or indirectly.

14. Defendant employs maintenance employees who do such work as remodeling office space and making repairs in The Wilson Building and The Wilson Tower Building. All such work is performed for the benefit of the tenants in

the two buildings and is required by defendant's rental agreements, either directly or indirectly.

15. Defendant employs one employee, Lupe Perez, who regularly, since February 1, 1967, has replaced burned-out light bulbs and fluorescent lamps throughout both The Wilson Building and The Wilson Tower Building in tenant offices, hallways and restrooms. The furnishing of such light bulbs and fluorescent lamps is required by defendant's rental agreements, either directly or indirectly.

16. All of the materials and supplies handled by employees of defendant doing janitorial work and maid work and by maintenance employees and by mechanical engineering employees are owned by defendant at the time they are used in and around The Wilson Building and Annex and The Wilson Tower Building. The defendant has complete control over such materials and can change brands and suppliers at will, without the consent of any tenant. The soap, paper towels and toilet tissue in the restrooms can be removed from the containers and replaced by defendant at will and such materials are available for use, not only by tenants, but by employees, clients and customers of tenants, employees of defendant and sometimes strangers. The light bulbs and lamps in the various offices of the tenants can be removed and replaced by defendant at will without the consent of any tenant. The light bulbs and lamps purchased by defendant are used in the lobbies and hallways of the buildings owned by defendant, as well as in office space occupied by tenants. The wax, detergent and other cleaning materials are used in the lobbies and hallways of the buildings as well as in the office space occupied by tenants, and are used by defendant to preserve the halls, lobbies of the buildings, and to keep them clean, as well as to keep the office space occupied by tenants clean and neat and in a state of preservation.

17. The materials and supplies handled by employees of defendant doing janitorial work and maid work, and by maintenance employees and by mechanical engineering employees, are purchased by defendant from business concerns in Corpus Christi, Texas. Soap, paper towels and toilet tissue and the wax, detergents and other cleaning material are purchased primarily from one distributor which owns the materials on its shelves as a part of its stock of merchandise for sale, and it sells and delivers supplies to defendant from such stock of merchandise. The light bulbs and lamps are purchased from a distributor in Corpus Christi, Texas, who owns the stock of merchandise on its shelves, and it sells and delivers such items to defendant from the stock of merchandise the distributor owns and has on its shelves for sale. The materials purchased by defendant, from time to time, for repairing and remodeling the buildings, for the benefit of the tenants during occupancy of office space and for the preservation of the buildings, are purchased from the Corpus Christi office of a business concern which does business outside of Texas, as well as within the state. Such materials remain the property of defendant. Tenants are not entitled to remove from the buildings any materials used in making repairs or in remodeling. A substantial portion of such materials are processed in Texas before the local office receives them. These materials are carried as a stock of merchandise and are owned by the wholesaler for sale to lumber yards and large individual purchasers, and the supplies delivered defendant are from the stock of merchandise on hand.

18. A substantial portion of the various materials purchased by defendant to be used by employees doing janitor and maid work and by maintenance employees and by mechanical engineering employees are shipped to the local wholesale and retail suppliers from points within the State of Texas.

19. But a substantial portion of the materials and supplies handled by defendant's janitors in the performance of their duties in every workweek since February 1, 1967 was manufactured outside the State of Texas.

20. Also, a substantial portion of the materials and supplies handled by defendant's maids in the performance of their duties in every workweek since February 1, 1967 was manufactured outside the State of Texas.

21. Further, a substantial portion of the materials installed and the supplies handled by defendant's maintenance employees in the performance of their duties in every workweek since February 1, 1967 was manufactured outside the State of Texas.

22. All the light bulbs and fluorescent lamps installed by the defendant are manufactured outside of the State of Texas.

23. There are no tenants in The Wilson Tower Building and there are no tenants in The Wilson Building engaged in the manufacture or production of goods for commerce.

24. The defendant is not, and never has been, engaged in the production of goods for commerce.

25. Since February 1, 1967, defendant has compensated certain of its employees at rates less than $1.00 per hour during the period beginning February 1, 1967, and ending January 31, 1968, at rates less than $1.15 an hour during the period beginning February 1, 1968, and ending January 31, 1969, and at rates less than $1.30 an hour thereafter.

26. Since February 1, 1967, defendant has employed certain of its employees for workweeks longer than 44 hours during the period beginning February 1, 1967, and ending January 31, 1968, for workweeks longer than 42 hours during the period beginning February 1, 1968, and ending Jan-

uary 31, 1969, and for workweeks longer than 40 hours thereafter, without compensating said employees for their employment in excess of such hours at rates not less than one and one-half times the regular rates at which they were employed.

27. Since February 1, 1967, defendant has failed to make, keep, and preserve adequate and accurate records reflecting the hours worked each workday and the total hours worked each workweek by many of its employees.

28. The amount of minimum wage, overtime compensation, or both, due defendant's elevator operators, janitors, maids, maintenance employees, mechanical engineering employees, parking garage employees, and parking lot employees has not been determined. However, such unpaid compensation shall be computed as follows:

(a) All amounts due prior to March 24, 1967, are barred by the two-year statute of limitations.

(b) The rates of pay, hours of work, and total earnings of defendant's employees shall be those reflected in defendant's payroll records and its daily or weekly time records, except it has been stipulated that employee Lupe Perez was paid a salary for a 40 hour workweek, that defendant's maintenance men were paid a salary for a 44 hour workweek, that employee Ray Cipriano and Frankie de los Santos worked alternating workweeks of 37½ hours and 45 hours and that employee Edward Fromm worked a basic 40 hour schedule.

(c) The regular rates of pay of defendant's salaried employees shall be determined by dividing the hours of work such salary was intended to compensate for into the salary.

(d) Employees who received a regular rate of pay of less than the applicable minimum wage, as set forth in

section 6(b) of the Act, during the period since March 24, 1967, shall be due minimum wage compensation equal to the difference between what such employees should have received if compensated for their work at the applicable minimum wage rate and what the employees actually received as straight time earnings.

(e) Employees who did not receive overtime compensation for their employment for workweeks in excess of 44 hours during the period March 24, 1967, to January 31, 1968, in excess of 42 hours during the period February 1, 1968, to January 31, 1969, and in excess of 40 hours thereafter, shall be due overtime compensation equal to one-half of their regular hourly rates of pay in such workweeks, or the applicable minimum wage rate under section 6(b) of the Act, whichever is the largest, multiplied by the number of overtime hours worked.

(f) Interest shall be computed on any minimum wages and overtime compensation found due defendant's employees at the rate of six per cent per annum from the date of such minimum wages and overtime compensation became due.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this action and of the defendant.

2. Defendant's elevator operators, janitors, maids, maintenance personnel, and mechanical engineers were "employees" of defendant since February 1, 1967, and defendant's parking garage personnel and parking lot personnel were "employees" of defendant since August 1, 1967 within the meaning of 29 U.S.C. § 203(e).

3. None of the employees of defendants are, or have been

at any time material hereto, engaged in the production of goods for commerce.

4. None of the employees of defendant are, or have been at any time relevant, engaged in an occupation directly essential to the production of goods for commerce.

[1] 5. Since February 1, 1967, defendant's janitors, maids, and maintenance employees have been engaged in the handling of materials that have been moved in or produced for commerce and would, therefore, be covered by 29 U.S.C. § 203(s)(5) if these materials were to constitute "goods", as that term is defined in the Act, 29 U.S.C. § 203(i). But these materials handled by the janitors, maids, maintenance employees and mechanical engineers are not "goods" under the definition in the Fair Labor Standards Act because such materials when handled and worked on by said employees are in the hands of the ultimate consumer.

[2] 6. Since February 1, 1967 defendant's elevator operators have been engaged in commerce (29 U.S.C. § 203(b). See Wirtz v. Columbian Mutual Life Insurance Company, 246 F.Supp. 198 (D.C.W.D. Tenn. 1965), affirmed 6 Cir., 380 F.2d 903; Wirtz v. McClure, 333 F.2d 45 (CA 10, 1964).

[3] 7. Since February 1, 1967, defendant has been engaged in related activities performed through unified operation and common control for a common business purpose and, as such, has been an enterprise within the meaning of section 3(r) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 203(r)).

[4] 8. Since February 1, 1967, defendant has been an enterprise engaged in commerce or in the production of goods for commerce within the meaning of section 3(s)(1) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 203(s)(1)).

9. Since February 1, 1967, defendant has violated the provisions of sections 6 and 15(a)(2) of the Act. (29 U.S.C. §§ 206 and 215(a)(2)).

10. Since February 1, 1967, defendant has violated the provisions of sections 7 and 15(a)(2) of the Act. (29 U.S.C. §§ 207 and 215(a)(2)).

11. Since February 1, 1967, defendant has violated the provisions of sections 11(c) and 15(a)(5) of the Act and the Administrator's regulations issued pursuant thereto. (29 U.S.C. §§ 211(c) and 215(a)(5) and 29 C.F.R., Part 516).

12. The plaintiff is entitled to an injunction permanently enjoining defendant from violating the provisions of sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.) and restraining the withholding by defendant of payment of minimum wage and overtime compensation found to be due defendant's employees since March 24, 1967, together with interest thereon at the rate of six percent per annum from the date said amounts became due.

Counsel for plaintiff will submit an appropriate judgment.

Appendix B
Part 2

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

CIVIL ACTION FILE NO. 69-C-52

JAMES D. HODGSON
(Successor to George P. Shultz),
Secretary of Labor, United States Department of Labor
Plaintiff,

v.

THE WILSON BUILDING, INC.,
a Corporation
Defendant.

JUDGMENT

In accordance with the findings of fact and conclusions of law signed and entered in this action on August 27, 1970, it is:

ORDERED, ADJUDGED and DECREED that defendant, its officers, agents, servants, employees, and all other persons acting or claiming to act in its behalf and interest be and they hereby are, permanently enjoined from violating the provisions of sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 (29 U.S.C. 201, *et seq.*) hereinafter referred to as the Act, in any of the following manners:

I.

Defendant shall not, contrary to sections 6 and 15(a)(2) of the Act, employ any employee in an enterprise engaged

Appendix B

Part 2

in commerce or in the production of goods for commerce, within the meaning of the Act, at rates less than the minimum hourly wage rates specified in section 6 of the Act.

II.

Defendant shall not, contrary to sections 7 and 15(a)(2) of the Act, employ any employee in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for a workweek longer than 40 hours, unless such employee receives compensation for his employment in excess of such hours at a rate not less than one and one-half times the regular rate at which he is employed.

III.

Defendant shall not, contrary to sections 11(c) and 15(a)(5) of the Act, fail to make, keep and preserve adequate and accurate records of the persons employed by it and of the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by regulations issued by the Administrator of the Wage and Hour and Public Contracts Divisions, United States Department of Labor (29 CFR, Part 516).

It is further ORDERED that defendant be, and it hereby is, restrained from withholding payment of minimum wage and overtime compensation in the total amount of $62,723.09,

which was found by the court to be due under the Act to defendant's employees named in Exhibit A, which is attached hereto and made a part hereof, in the amounts stated therein, together with interest thereon at the rate of six percent per annum from the date said amounts became due.

The provisions of this order shall be deemed satisfied when the defendant delivers to the plaintiff a cashier's or certified check for each employee named above, payable to the named employee, or "Wage and Hour Division-Labor" in the total amount of compensation due each said employee, together with interest thereon at the rate of six per cent per annum from the date said amount became due, less appropriate income tax and social security deductions. Payment of said amounts shall be made within thirty (30) days from the date of this judgment.

ORDERED that plaintiff distribute the proceeds from said checks to the persons named in Exhibit A, or to their estate if that is necessary, and any money not so paid within three years of the date hereof, because of inability to locate the proper persons or because of their refusal to accept it, shall be covered into the Treasury of the United States as miscellaneous receipts.

The costs of this action will be paid by the defendant.

Dated this 2nd day of March, 1971.

/s/ .....
United States District Judge